JURY TRIAL AND THE FEDERAL CONSTITUTION.

Trial by jury in both civil and criminal cases is secured in the federal courts by express provisions of the United States Constitution.[1] This has been held to mean trial by jury as it existed at common law.[2] And from this results both a definition of the nature of the right and a limitation of the cases wherein it is applicable. Thus it has been held that the jury of the Constitution is a jury of twelve men who give a unanimous verdict.[3] On the other hand, following the common law, the right does not extend to cases arising in Equity,[4] Admiralty, or before properly constituted military tribunals.[5] In like manner the intervention of a jury is not necessary in certain cases where the prerogatives of the court are involved, such as the punishment of contempts,[6] and the disbarment of attorneys,[7] nor in other cases where political and executive functions are involved, such as the enforcement of the Chinese exclusion acts.[8] Although all power exercised by any department of the United States government must emanate from the Constitution, yet inasmuch as that instrument was made for the United States and not for foreign countries, it has been held that jury trial is not necessary in a United States consular tribunal, sitting in Japan under treaty stipulations, although the offense in question was committed on an American vessel.[9] And recent events having made necessary a definition of the "United States" of the Constitution, it has been held, although the theory upon which the cases rest is still in dispute even in the Supreme Court, that the Constitution does not secure the right of jury trial in the

[1] Art. 3, section 2. Sixth and Seventh Amendments.

[2] Thompson *v.* Utah (1898) 170 U. S. 343, 349. Capital Traction Co. *v.* Hof (1899) 174 U. S. 1. Maxwell *v.* Dow (1899) 176 U. S. 581.

[3] American Insurance Co. *v.* Fisher (1897) 166 U. S. 464; Springville *v.* Thomas (1897) 166 U. S. 707; Capital Traction Co. *v.* Hof, *supra.*

[4] In re Debs (1895) 158 U. S. 564.

[5] Ex parte Milligan (1867) 4 Wall 2,122.

[6] Ex parte Terry (1888) 128 U. S. 289.

[7] Ex parte Wall (1882) 107 U. S. 265.

[8] Fong Fue Ting *v.* United States (1892) 149 U. S. 698.

[9] Ross *v.* McIntyre (1891) 140 U. S. 453.

Philippines,[1] nor in Hawaii,[2] until the Constitution is "extended" or the islands "incorporated" into the United States. It had already without much consideration been held that the right existed in the District of Columbia,[3] and in the older territories,[4] and it has recently been held that the same rule applies to Alaska and that irrespective of the express extension of the Constitution by legislation.[5]

Is a defendant on trial in a state court for a capital offense against the State entitled under any provision of the United States Constitution to a trial by jury? This question may be answered in the negative with as much assurance as it is possible to answer any question of federal constitutional law which has not been squarely decided by the Supreme Court. But inasmuch as a question of this kind is never settled except by a decision expressly in point, and sometimes not even then, it may be worth while briefly to review the cases.

It has never been thought that the second section of Article Three of the Constitution referred to the States. The Supreme Court early decided that the first ten amendments were also limitations on the power of the national government and not upon that of the States.[6] This ruling has been affirmed times without number. In a late case the court contented itself with saying:

"Plaintiff in error cannot avail himself of the provisions of the Fifth and Sixth Amendments, for reasons we have so often expressed that it would be the extreme of superfluity to repeat them. It is enough to say that those amendments do not apply to proceedings in the state courts."[7] Although among the many cases which held that the first ten amendments had no application to the States

[1]Dorr *v.* United States (1903) 195 U. S. 138.

[2]Hawaii *v.* Mankichi (1903) 190 U. S. 197. See a valuable article by Judge McClain, 17 Harvard Law Review 386.

[3]Callan *v.* Wilson (1887) 127 U. S. 540. Capital Traction Co. *v.* Hof (1899) 174 U. S. 1.

[4]Webster *v.* Reid (1850) 11 Howard 437. Reynolds *v.* United States (1878) 98 U. S. 145. Springville *v.* Thomas (1896) 166 U. S. 707.

[5]Rasmussen *v.* United States (1905) 197 U. S. 516.

[6]Barron *v.* Baltimore (1833) 7 Pet. 243.

[7] Howard *v.* Kentucky (1906) 200 U. S. 164, 172.

which arose prior to the Fourteenth Amendment[1] there was none where the facts directly involved the right of trial by jury,[2] yet in Twitchell *v.* Commonwealth[3] it was expressly held that other rights secured to the accused in a criminal trial by the Sixth Amendment were not protected as against the States. There was therefore no ground whatever for the contention that the federal Constitution secured the right of trial by jury in the States before the Fourteenth Amendment.

The Fourteenth Amendment prohibited the States from "abridging the privileges and immunities of citizens of the United States," from depriving "any person of life, liberty and of property without due process of law" or denying to "any person the equal protection of the laws."

The Supreme Court proceeded to distinguish between State and federal citizenship[4] and to limit the latter to those "privileges and immunities arising out of the nature and essential character of the national government, and granted or secured by the Constitution of the United States."[5] It was held without much argument, two judges dissenting, that a jury trial in a civil suit in a State court was not a privilege or immunity of a citizen of the United States and its absence was not necessarily a failure of "due process" of law.[6] In the great case of Hurtado *v.* California[7] it was held, after elaborate argument, Justice Harlan dissenting, that immunity from prosecution in a State court except on indictment by grand jury even in a

[1] See Fox *v.* Ohio (1847) 5 How. 434 (Fifth Amendment, previous jeopardy); Smith *v.* Maryland (1855) 18 How. 71 (Fourth Amendment, warrants on probable cause supported by oath); Pervear *v.* Commonwealth (1866) 5 Wall. 475 (Eighth Amendment, excessive fines).

[2] Edwards *v.* Elliott (1874) 21 Wall. 532, holding that the Seventh Amendment (securing jury trial in civil cases) does not apply to the States was decided just after the adoption of the Fourteenth Amendment which however played no part in the decision.

[3] (1868) 7 Wall. 321.

[4] Slaughter House Cases (1872) 16 Wall. 36.

[5] United States *v.* Cruikshank (1875) 92 U. S. 542 (quotation from In re Kemmler (1889) 136 U. S. 436, 448.)

[6] Walker *v.* Sauvinet (1875) 92 U. S. 90.

[7] (1883) 110 U. S. 516; accord, Maxwell *v.* Dow (1899) 176 U. S. 581; Hallinger *v.* Davis (1892) 146 U. S. 314; McNulty *v.* California (1892) 149 U. S. 645; Hodgson *v.* Vermont (1897) 168 U. S. 262, 272; Holden *v.* Hardy (1897) 169 U. S. 366, 384; Brown *v.* New Jersey (1899) 175 U. S. 172, 176; Bolln *v.* Nebraska (1899) 176 U. S. 83.

capital case, was not a requisite of due process of law and incidentally that it was not a privilege and immunity of a citizen of the United States. In spite of these decisions holding that the rights secured by the Seventh and Fifth Amendments as against the United States had not become privileges and immunities under the Fourteenth, the question was raised again by counsel in Presser *v.* Illinois[1] and strenuously urged by Mr. J. Randolph Tucker in argument in Spies *v.* Illinois,[2] the anarchists' case. In O'Neil *v.* Vermont,[3] the contention had captured three members of the court. The contention was thus stated by the court in Spies *v.* Illinois, adopting largely the language of Mr. Tucker's brief:

"It was contended, however, in argument, that, 'though originally the first ten amendments were adopted as limitations on Federal power, yet in so far as they secure and recognize fundamental rights—common law rights—of the man, they make them privileges and immunities of the man as a citizen of the United States, and cannot now be abridged by a State under the Fourteenth Amendment.' In other words, while the ten Amendments as limitations on power only apply to the Federal Government, and not to the States, yet in so far as they declare or recognize rights of persons, these rights are theirs, as citizens of the United States, and the Fourteenth Amendment as to such rights limits State power, as the ten amendments had limited Federal power."[4] In none of these cases was it necessary for the court to squarely pass upon this contention, but finally, as late as 1900, in Maxwell *v.* Dow[5] the point was squarely raised and finally decided. The constitution of Utah while retaining the common law jury in capital cases reduced the number of jurors to eight in all other cases in courts of general jurisdiction. Maxwell was

[1] (1886) 116 U. S. 252 (contention based on right to bear arms, Second Amendment).

[2] (1887) 123 U. S. 131.

[3] (1892) 144 U. S. 323 (contention that a punishment inflicted by State court was "cruel and unusual"). See also in re Kemmler, *supra*. See an interesting article by Judge McClain, "Federal Protection against State Power," 6 Harvard Law Review 405, suggested by the decision in O'Neil *v.* Vermont.

[4] Spies *v.* Illinois (1887) 123 U. S. 131, 166.

[5] (1900) 176 U. S. 581.

put on trial for the crime of robbery on the information of a county prosecutor without the intervention of a grand jury and tried and convicted by a jury of eight men. The Supreme Court reviewed all the cases in an elaborate opinion and once more decided that the rights secured by the first ten amendments of the United States Constitution against federal aggression had not become "privileges or immunities" of citizens of the United States under the Fourteenth Amendment, and specifically that it was not a "privilege or immunity" of a citizen of the United States to be punished for crime only after indictment by a grand jury and trial and conviction before a common law petit jury.[1]

Although the Utah constitution did not apply to capital cases, since the entire contention that trial by a common law petit jury is a privilege and immunity of a citizen of the United States rests on the fact that it is secured by the Sixth Amendment, if such trial can be dispensed with in

[1] As has been pointed out it would seem very doubtful whether under the interpretation given by the Court to the words "privileges or immunities" of citizens of the United States, this clause of the Fourteenth Amendment really adds anything to the original constitution properly construed. It was held in Minor *v.* Happersett (1874) 21 Wall. 162, that the Amendment did not add to the "privileges and immunities" but simply added a guarantee. But surely the States could never have abridged "those privileges and immunities arising out of the nature and essential character of the National Government." A sufficient explanation for the appearance of the words might well be found in a desire to make assurance doubly sure in regard to a matter which had given rise to bitter controversies in antebellum days.

The suggestions of the critics of Maxwell *v.* Dow, *supra*, that under the ruling in that case a State could establish a state church and tax all citizens for its maintenance (see Harlan, J. dissenting (1899) 176 U. S. 615) or could legalize burning at the stake as a punishment for crime (see 4 Harvard Law Review 287, commenting on In re Kemmler, 136 U. S. 436) would seem to be exaggerated. The provision in regard to "due process of law" still remains, and the fact that anything is specially prohibited in the first ten amendments does not show that it is not also prohibited by the clause in the Fourteenth Amendment in regard to due process of law. It is true that the Fifth Amendment contains a due process of law clause and it has been said that the meaning of the words is the same in the Fifth and the Fourteenth Amendment; that every word of the Constitution must serve some purpose and that therefore nothing which is specifically prohibited in the first ten amendments can amount to a deprivation of due process of law (see Hurtado *v.* California (1883) 110 U. S. 516). But this line of argument seems entirely too technical to be sound in construing a constitution and has been repudiated in Chicago, Burlington & Quincy Railroad *v.* Chicago (1897) 166 U. S. 226, 233, 241, where it was held that taking property for public use without just compensation although expressly prohibited by the Fifth Amendment to the national government was prohibited to the States by the due process of law clause in the Fourteenth.

any case covered by that Amendment it can be dispensed with in every case, so far as the question of abridging federal privileges or immunities is concerned.

But the question of "due process of law" is often a matter of more or less, a question of degree. A procedure which might be sufficient in case of some petty misdemeanor might be so harsh and arbitrary as to amount to a deprivation of due process as applied to serious offenses. It is, therefore, theoretically possible to distinguish Maxwell *v.* Dow from a case where the life of the citizen is involved, and the language of the opinion is, in general, expressly limited to "criminal cases not capital." There is however not the slightest suggestion that the result would be different in a capital case. And toward the close of the opinion the court sums up the result of the cases as follows:

"The reasons given in the learned and most able opinion of Mr. Justice Matthews in the Hurtado case, for the judgment therein rendered, apply with equal force in regard to a trial by a jury of less than twelve jurors. The right to be proceeded against only by indictment, and the right to a trial by twelve jurors, are of the same nature, and are subject to the same judgment, and the people in the several States have the same right to provide by their organic law for the change of both or either."[1]

It will be remembered that Hurtado was convicted of a capital offense after prosecution upon information by the District Attorney. If the right to a grand jury and to a petit jury are "of the same nature" and "subject to the same judgment" it would seem that Mr. Justice Harlan, dissenting, correctly interpreted the scope of the opinion when he said:

"Indeed, under the interpretation now given to the Amendment, it will, I think, be impossible to escape the conclusion that a State may abolish trial by jury altogether in a criminal case, however grave the offense charged, and authorize the trial of a case of felony before a single judge."[2]

Again the opinion of the Court proceeds:

"When providing in their constitution and legislation for the manner in which civil or criminal actions shall be

[1] Maxwell *v.* Dow (1900) 176 U. S. 581, 604.
[2] *Ibid*, 612.

tried, it is in entire conformity with the character of the Federal Government that they (the States) should have the right to decide for themselves what shall be the form and character of the procedure in such trials, whether there shall be an indictment or an information only, whether there shall be a jury of twelve or a less number, and whether the verdict must be unanimous or not. These are matters which have no relation to the character of the Federal Government."

When we bear in mind the general attitude of the court on this subject, especially as reflected in the opinions in Missouri *v.* Lewis, and Hurtado *v.* California,[1] both of which are approved in Maxwell *v.* Dow, and consider that events since 1900 have tended both to increase the knowledge of and respect for the principles of the civil law among American lawyers and judges, it is hardly conceivable that the difference in degree between capital and non-capital offenses should lead to a different result in the two classes of cases. We may conclude that in no case does the federal Constitution secure to any man a jury trial in a State court.[2]

But although the federal Constitution does not secure a jury trial to any one, it does secure to everyone, whether tried

[1] In Missouri *v.* Lewis (1876) 101 U. S. 22, 32, Mr. Justice Bradley said: "If a Mexican State should be acquired by treaty and added to an adjoining State, or part of a State, in the United States, and the two should be erected into a new State, it cannot be doubted that such new State might allow the Mexican laws and judicature to continue unchanged in the one portion, and the common law and its corresponding judicature in the other portion. Such an arrangement would not be prohibited by anyfair construction of the Fourteenth Amendment. And in Hurtado *v.* California (1884) 110 U. S. 516, 530, Mr. Justice Matthews made the oft quoted prophesy: 'The Constitution of the United States was ordained, it is true, by descendants of Englishmen, who inherited the traditions of English law and history; but it was made for an undefined and expanding future, and for a people gathered and to be gathered from many nations and of many tongues. And while we take just pride in the principles and institutions of the common law, we are not to forget that in lands where other systems of jurisprudence prevail, the ideas and processes of civil justice are also not unknown. Due process of law, in spite of the absolutism of continental governments, is not alien to that code which survived the Roman Empire as the foundation of modern civilization in Europe, and which has given us that fundamental maxim of distributive justice—*suum cuique tribuere.*'" No question of the equal protection of the laws would seem to arise from the total abolition of jury trial.

[2] See the guarded statement in Judge McClain's "Constitutional Law in the United States," 1905, p. 340; "'due process of law,' which the States are by Amendment XIV prohibited from impairing, does not necessarily involve jury trial, at least in civil cases (Maxwell *v.* Dow)."

by jury or not, a trial which shall not deprive him of "life, liberty or property without due process of law" or deny to him the "equal protection of the laws."[1] The State may take from its citizens the right of jury trial or modify that right as it sees fit so long as it does not violate these two provisions. Every one knows that "due process of law" means the same in the Fourteenth Amendment that it does in the Fifth, and that it is synonymous with "'by the law of the land' in *Magna Charta*."[2] We all know that Webster said that:

"By the law of the land is most clearly intended the general law—a law which hears before it condemns, which proceeds upon inquiry and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society."[3]

Perhaps it is fair to say that in general we are agreed on two more propositions, first, that anything not contrary to the provisions of the Constitution which is in accord with the "settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country"[4]—that is to say, anything old—is due process of law; second, that "any legal proceeding enforced by public authority, whether sanctioned by age and custom or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves * * * the * * * principles of liberty and justice," that is to say anything which although new is reasonable, "must be held to be due process."[5] It ought to be possible to add that we are all agreed that the legislature and not the court is to judge as to what is reasonable and unless the result is so unreasonable "as to degenerate into an irrational excess, so as to become in reality, something different and for-

[1] See in this connection a valuable article entitled "The Anarchists Case," 1 Harvard Law Review 307, 318.

[2] Murray's Lessee *v.* Hoboken Land Company (1855) 18 How. 272, 276.

[3] Webster in Dartmouth College *v.* Woodward, 5 Webster's Works 487.

[4] Murray's Lessee *v.* Hoboken Land Company, *supra*.

[5] Hurtado *v.* California (1884) 110 U. S. 516.

bidden"[1]—that is to say unless the legislative action is outrageous, it is due process of law. But while most courts and lawyers assent to this proposition in theory, it would seem from the decisions that the assent is in many cases mere lip service. In general, then, anything enacted by the legislature or established by judicial decision which is not so unreasonable as to convince the court that it is outrageous is "due process of law."

As to the "equal protection of the laws" the words were of course inserted with a special reference to the protection of the negro[2] although they have been held to embrace all persons and classes within their purview.[3]

The "equal protection of the laws" does not mean that all shall be treated alike; it does not forbid reasonable classification but forbids arbitrary discrimination.[4] In the light of its history it must also be taken to forbid certain classifications, racial for instance, which might not under some circumstances be so unreasonable as to be obnoxious to the clause in regard to due process. In certain parts of the country for instance a regulation discriminating against negroes or Chinamen or Indians, might considering local sentiment not be so unreasonable as to amount to a failure of due process but it would be a denial of the equal protection of the laws.[5] It is sometimes suggested that the *enforcement* of a law cannot deprive any one of the equal protection of the laws but clearly it can if the law sets up an unfair classification.

If a law is outrageous and applies to all alike it is not "due process" although it may not amount to a denial of

[1] This was a favorite thesis of the late Professor Thayer. See his masterly article, 7 Harvard Law Review 129, 148. See also Cooley, Constitutional Limitations, 7th ed., 252–256.

[2] Slaughter House Cases (1876) 16 Wall. 36; Strauder *v.* West Virginia (1879) 100 U. S. 303.

[3] Yick Wo *v.* Hopkins (1886) 118 U. S. 356; Pembina Mining Company *v.* Pennsylvania (1888) 125 U. S. 181; Smyth *v.* Ames (1898) 169 U. S. 466. "Section 641, as well as the Fourteenth Amendment of the Constitution, is for the benefit of all of every race whose cases are embraced by its provisions and not alone for the benefit of the African race." Harlan, J., for the court in Kentucky *v.* Powers (1906) 201 U. S. 1, 32.

[4] Barbier *v.* Connolly (1885) 113 U. S. 27; Gulf Ry. Co. *v.* Ellis (1897) 165 U. S. 150; Holden *v.* Hardy (1898) 169 U. S. 366.

[5] Strauder *v.* West Virginia (1879) 100 U. S. 303, and the other negro jury cases cited in notes; Yick Wo *v.* Hopkins, *supra*, and the Chinese cases.

"equal protection." If the classification although reasonable be along racial, social, political or religious lines it amounts to a denial of the equal protection of the laws,[1] although it may not be under the circumstances so outrageous as to fail in affording "due process." If the law works an unreasonable discrimination between persons, races and classes, it is clearly bad on both counts.

The State then can modify or regulate the right of trial by jury so long as the regulations are not outrageous and do not unduly discriminate between persons and classes. Thus, the State can provide for different courts of appeal for the same kind of cases in different parts of the State, such regulation being reasonable under the circumstances.[2] It can provide that more challenges be given to the prosecution in cities than in the country districts,[3] or that the jurors be selected in a different manner in different counties.[4] Said Harlan, J., in a recent case:[5]

"The requirement of the constitution of 1890 that no person should be a grand or petit juror unless he was a qualified elector and able to read and write did not prevent the legislature from providing, as was done in the code of 1892, that persons selected for jury service should possess good intelligence, sound judgment and fair character. Such regulations are always within the power of a legislature to establish unless forbidden by the constitution. They tend to secure the proper administration of justice and are in the interest equally of the public and of persons accused of crime."

District Judge Cochran, in his opinion in the Circuit Court in Commonwealth of Kentucky *v.* Powers,[6] remarked that "in the matter of selecting jurors, it is well settled that there may be a discrimination by the state between persons within its jurisdiction that is just and reasonable, and hence

[1] "But in our country hostile and discriminating legislation by a state against persons of any class, sect, creed or nation, in whatever form it may be expressed, is forbidden by the fourteenth amendment."—Field, J., in Ho Ah Kow *v.* Nunan (1879) Fed. Cas. No. 6,546 at p. 256.

[2] Missouri *v.* Lewis (1879) 101 U. S. 22.

[3] Hayes *v.* Missouri (1887) 120 U. S. 68.

[4] Gardner *v.* Michigan (1905) 199 U. S. 325.

[5] Gibson *v.* Mississippi (1896) 162 U. S. 565, 589.

[6] (1905) 139 Fed. 452, 462.

right, under the fourteenth amendment," and he cited from Justice Strong, in Strauder *v.* Virginia:[1]

"We do not say that, within the limits from which it is not excluded by the amendment, a state may not prescribe the qualifications of its jurors, and, in so doing, make discriminations. It may confine the selection to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications. We do not believe the fourteenth amendment was ever intended to prohibit this. Looking at its history, it had no such purpose."

What kind of jury law would be unreasonable or amount to a discrimination between persons and classes? Many cases have said that the exclusion by State law of negroes from juries amounts to a denial of the equal protection of the laws to a member of the negro race tried and convicted by such a jury.[2] In certain parts of the country, considering local prejudices and race standards, it might well be that a legislature could reasonably think that negroes should be excluded from juries, but this is evidently the very case for which the equal protection clause was intended to provide. The right involved, as it has been repeatedly held, is not a right to a mixed jury or to a jury selected from a list containing the names of negroes. It is a right in the negro defendant not to have the members of his race excluded solely on account of their race.[3] It would seem that the law is equally invalid, no matter whether the defendant happens to be a negro or not, but in ordinary circumstances a white man could not be injured by the exclusion of negroes from the jury which was to try him and doubtless would not be allowed to raise the point for that reason. The racial facts might be varied in interesting ways, but it would presumably remain a question of fact whether the defendant was actually prejudiced by the irregularity.

The Fourteenth Amendment applies to a State action, not individual action,[4] but it applies to State action in any

[1] (1879) 100 U. S. 303, 310.

[2] Strauder *v.* West Virginia, *supra*; Bush *v.* Kentucky (1882) 107 U. S. 110.

[3] Virginia *v.* Rice (1879) 100 U. S. 313; Martin *v.* Texas (1905) 200 U. S. 316.

[4] Civil Rights Cases (1883) 109 U. S. 3.

form, executive and judicial as well as legislative.[1] In the language of the famous passage in Yick Wo *v.* Hopkins:

"Though the law itself be fair on its face and impartial in appearance, yet if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."[2]

And in the language of Mr. Justice Gray in a more recent case:

"Whenever by any action of a State, whether through its legislature, through its courts, or through its executive or administrative officers, all persons of the African race are excluded, solely because of their race or color, from serving as grand jurors in the criminal prosecution of a person of the African race, the equal protection of the laws is denied to him contrary to the Fourteenth Amendment of the Constitution of the United States."[3]

The case of Kentucky *v.* Powers[4] which has recently been before the Supreme Court of the United States seems to suggest facts which fall within the foregoing principles. Powers, being under indictment and awaiting trial in the State courts of Kentucky for the murder of Senator Goebel, petitioned for the removal of his case to the federal Circuit Court on substantially the following showing: He alleges that he is a Republican leader on trial for the murder of the Democratic leader in the State, at a time of intense political excitement, that he has already been tried three times and that in each instance the jurymen who tried him were drawn from counties where the ratio of Democrats to white Republicans was about two to one; that not a single Republican has been allowed to serve on any of these juries; and that this result is due to intentional discrimination against Republicans as jurors on the part of the court and its officers. Powers made seasonable objection through chal-

[1] Carter *v.* Texas (1900) 177 U. S. 442; Rogers *v.* Alabama (1904) 192 U. S. 226; Strauder *v.* West Virginia (1879) 100 U. S. 303; Neal *v.* Delaware (1880) 103 U. S. 370; Gibson *v.* Mississippi (1896) 162 U. S. 565; Tarrance *v.* Florida (1903) 188 U. S. 519; Murray *v.* Louisiana (1896) 163 U. S. 101; Ho Ah Kow *v.* Nunan (1879) Fed. Cas. No. 6,546.

[2] Yick Wo *v.* Hopkins (1886) 118 U. S. 356, 373.

[3] Carter *v.* Texas (1900) 177 U. S. 442, 447.

[4] (1906) 201 U. S. 1.

lenges to the panel supported by evidence[1] and through various motions, among them a motion to instruct the officers of the court to summon prospective jurymen without regard to their political affiliations. All these objections and motions were overruled. The question was fairly made on the record. Said Judge Barker of the Kentucky Court of Appeals: "It is clear that the trial judge was of opinion that it was not an offense against the Fourteenth Amendment or a denial of the equal protection of the laws to the defendant, to exclude Republicans from the jury solely because they were Republicans, provided the selected Democrats were possessed of the statutory qualifications required for jury service."[2] Nevertheless the Court of Appeals, although reversing the case on other grounds, was, in the opinion of the majority of its members, unable to consider the federal question involved because of Section 281 of the Criminal Code which provides that the decision of the lower court as to challenges to the panel shall not be subject to exception.

In the United States Circuit Court District Judge Cochran held that Powers had a federal right not to have Republicans discriminated against in the selection of the jury; that the allegations of the petition as to the facts of the case were borne out substantially by the transcript, and since the State had not seen fit to deny them must be taken as true; and that under the circumstances of the case the unappealable rulings of the trial court justified removal under section 641 of the United States statutes providing for removal of any criminal prosecution against any person "who is denied or cannot enforce in the judicial tribunals of the State * * * any right secured to him by any law providing for the equal rights of citizens of the United States."

The State appealed and the Supreme Court held, through Justice Harlan, that if the accused had been denied any federal right it resulted not from the law of the State but from bad administration, and that in view of prior

[1] As to the duty of the plaintiff in error who complains that the administration of the local law has denied him the equal protection of the laws to present evidence to support his contention, see Carter *v.* Texas (1900) 177 U. S. 442; Tarrance *v.* Florida (1903) 188 U. S. 519.

[2] Commonwealth of Kentucky *v.* Powers (Ky. 1904) 83 S. W. 146, 149.

holdings the right of removal exists only in case the denial is the result of some provision of the constitution or laws of the State.[1] The remedy for bad administration denying a federal right is through writ of error to the highest State court which had jurisdiction of the federal question involved, in this case the State circuit court, after the highest appellate court of the State has disposed of all points over which it has jurisdiction. Having held that the federal courts had no jurisdiction the court expressed no opinions on the merits of any of the questions involved, or as to whether the facts alleged if true would amount to a denial of a federal right, further than to remark:

"It is true that looking alone at the petition for removal the trials of the accused disclose such misconduct on the part of administrative officers connected with those trials as may well shock all who love justice and recognize the right of every human being, accused of crime, to be tried according to law. * * * Taking then the facts to be as represented in the petition for removal, still the remedy of the accused was not to have the prosecution removed into the federal court."[2]

Assuming the allegations of the petition in the Powers case to be true it would seem to follow clearly that a federal right was invaded. As we have seen, improper exclusion by the administrative officers, once proved, is just as much a violation of the Amendment as improper exclusion by law. The case made in the petition is just the same as it would be if the State of Kentucky by law excluded all Republicans from jury service. No one can think that a reasonable regulation under ordinary circumstances. It would ordinarily be just as bad as the exclusion of all Presbyterians, or all men with blue eyes. As Judge Strong said in Strauder *v.* West Virginia:[3]

"Nor if a law should be passed excluding all naturalized Celtic Irishmen, would there be any doubt of its inconsistency with the spirit of the amendment."

[1] The court relies upon Ex parte Wells (1878) 3 Woods, 128, 132; Strauder *v.* West Virginia (1879) 100 U. S. 303, 309, 312; Virginia *v.* Rives (1879) 100 U. S. 313, 321; Neal *v.* Delaware (1880) 103 U. S. 370, 386; Bush *v.* Ky. (1882) 107 U. S. 110, 116; Gibson *v.* Mississippi (1896) 162 U. S. 565, 581, 584; Charley Smith *v.* Mississippi (1896) 162 U. S. 592, 600.

[2] Kentucky *v.* Powers (1906) 201 U. S. 133.

[3] (1879) 100 U. S. 303, 308.

It is, of course, theoretically possible that under the circumstances existing in a particular locality there might be such a difference in the general character and intelligence of the members of the two political parties as to make such a rule reasonable. For this state of things to exist it would not be necessary for all members of the excluded party to be incompetent, any more than it is for all men over sixty years old to be incompetent. It would be enough if this was a reasonable general rule. But even under those circumstances such a rule if enacted in terms would be bad, because it would be a denial of the equal protection of the laws, just as a rule excluding negroes as such is bad. It is true that in such a locality as I have supposed an honest administration of a law merely requiring competent men would as a matter of fact result in juries composed largely or entirely of members of one political party, and to this there could be no objection, ordinarily at least. And it has been suggested by the prosecution that substantially this is the situation in the counties in Kentucky from which the Powers juries have been drawn—that the great majority of the Republicans are either negroes not possessing the statutory qualifications or federal office holders. Without dwelling on the improbability of this suggestion, it is enough to say that if true it will be necessary to put this situation in evidence. For if the facts on a future trial should show that the Republicans were excluded and this should not be explained, Yick Wo *v.* Hopkins,[1] relied on by Judge Cochran, seems distinctly in point. It will be remembered that in that case the allegations were that a license had been refused to every Chinaman, and, with one exception, granted to every applicant not a Chinaman. Said the Court:

"The fact of this discrimination is admitted. No reason for it is shown, and the conclusion cannot be resisted that no reason for it exists, except hostility to the race and nationality to which the petitioners belong, and which in the eye of the law is not justified."[2]

[1] Kentucky *v.* Powers, *supra*. Judge Barker meets this suggestion as follows: "Nor do I believe that it is a valid excuse to say there are no qualified jurors of the party of the accused in the county where the jury is summoned, when there are other counties in which this adverse circumstance does not exist." Powers *v.* Commonwealth (Ky. 1904) 83 S. W. 146, 151.

[2] (1885) 118 U. S. 356, 374.

Again, circumstances might perhaps be imagined when the intentional exclusion of all members of any given political party might be a reasonable rule of administration. Suppose there had been a bitter factional fight in the Republican party in Kentucky and the crime under investigation grew, as that of the murder of Goebel did, out of the political struggle. It might well be the fairest thing to exclude all Republicans and permit the case to be tried by the Democrats and the Prohibitionists. And it would seem that a rule to that effect, even if technically illegal, would work no hardship and would not constitute reversible error. But what is the situation in the Powers case? "During a period of political excitement and bitterness perhaps unexampled in the history of the Commonwealth," to use the words of Judge DuRelle,[1] the Democratic leader is assassinated. A Republican conspiracy is charged, and one of the leading Republicans indicted and put on trial for the murder, and it is alleged that all Republicans are intentionally excluded from the jury. That this was highly prejudicial to Powers under the circumstances there can be no doubt.[2] Judge

[1] Powers *v.* Commonwealth (1901) 110 Ky. 386, 400.

[2] A short summary of the judicial history of the political controversy out of which the Powers case arose may be useful, not for the purpose of expressing any opinion on the merits of any of the questions involved, still less with the idea of suggesting that any judicial officer has been consciously influenced by political considerations, but solely for the purpose of showing that under the peculiar circumstances of this case the intentional exclusion of jurors of the same political faith as the accused, if it took place as alleged, was highly prejudicial to the defendant and a denial of the equal protection of the laws.

The so-called Goebel election law, passed by the Democratic majority of the Kentucky legislature over the veto of a Republican governor, placed the election machinery of the State largely in the hands of a commission appointed by the legislature. It was bitterly assailed as unconstitutional by the Republicans. A test case was at once brought and the constitutionality of the law was sustained, the four Democratic judges upholding the law and the three Republican judges vigorously dissenting. Purnell *v.* Mann (1898) 105 Ky. 87. In the course of the dissenting opinion it is said of the law: "Its provisions are so plainly and unmistakably vicious that they may be seen of all men who will take the trouble to compare the two laws." The law having been sustained, the State election for governor and other officers was held under it. After a campaign of unexampled bitterness Mr. Taylor was declared elected over Senator Goebel on the face of the returns by the returning board. Goebel at once commenced a contest before the legislature as he had a right to do. During the contest he was shot and fatally wounded apparently from a window of the executive building then in the control of his political opponents. Before his death he was declared governor by the legislature and Beckham, who succeeded to his rights, at once commenced

Barker, in his separate opinion filed on the reversal of the third verdict against Powers, said:

"I do not believe that any man charged with a political offense or with an offense originating in a political contest,

action to oust Taylor. In Taylor *v.* Beckham (1900) 108 Ky. 278, the court sustained Beckham's contention. Two Republican judges concurred separately, and one dissented. All the Republican judges took occasion to pay their respects to the situation. The Republican judges commented severely on the proceedings of the legislature and the Goebel law. Said Judge DuRelle, p. 319, "Neither the criminal purpose of the present election law, nor its potential spawn of force and fraud, now realized, availed to engender anything beyond mild doubt of its constitutionality." The decision was affirmed by the United States Supreme Court, 178 U. S. 548. At p. 577 the court referred to the case of Sweeny *v.* Poyntz, Cir. Ct. U. S. Dist. Ky. per Taft, J. Meanwhile the Goebel law had been before the court once more and had been again sustained by a strict party vote of four to three. Poyntz *v.* Shackelford (1900) 107 Ky. 546.

The lower court (Judge Cantrell, who presided at the first two Powers trials) granted the injunction sought by the Democratic officeholders and dissolved it in the same order. It was alleged by the Republican defendants that this unusual procedure was adopted in order to give the Democrats the opportunity of selecting the judge before whom they would be heard on appeal. The conduct of the lower court was sharply criticized in the dissenting opinion and warmly commended by the majority as an exercise of "good faith by a conscientious judge, in a doubtful state of the law, to the end that without any uncertainty, a proceeding in the nature of an appeal might be prosecuted in a grave and important matter."

The State board of election commissioners having decided the minor contests for State offices in favor of the Democrats the Goebel law was once more taken into court and sustained for the last time. (1900) 109 Ky. 295. The Republicans dissented. But the election which gave the Democrats the governor turned the Court of Appeals over to the Republicans by a majority of four to three, and when a belated election case reached the reconstituted court the Republican contestants were given relief and the Goebel law declared unconstitutional. The Democrats dissented. Pratt *v.* Breckenridge (1901) 112 Ky. 21. Said Justice Hobson, referring to the framers of the constitution:

"No sadder illustration of their wisdom in keeping political questions from the judiciary can be given than the history of this court for the past ten years. * * * Now after a change in the personnel of the court by the same vote of four to three, all this is overturned and the opposite conclusions established" (p. 47). And Chief Justice Paynter added, the decision "is revolutionary in character. It is such opinions as this that bring reproach upon courts" (p. 52). Caleb Powers entitles a chapter in his book "A Republican Judge Elected."

Meanwhile Caleb Powers, Republican Secretary of State, had been indicted for the murder of Goebel. On the occasion of his preliminary hearing feeling ran high and an armed conflict was narrowly averted in the court room. (Press dispatches March 23, 1900.) A State election had been held in which the guilt or innocence of Powers was substantially a political issue. Taylor was indicted but escaped to Indiana and the Republican governor refused to extradite him. He became a Republican orator in the Indiana campaign. Powers was brought to trial before Judge Cantrell, convicted and obtained a reversal in the Court of Appeals. Powers *v.* Commonwealth (1901) 110 Ky. 386. The three Democratic judges dissented. Again he was convicted and again obtained a reversal, (1902) 114 Ky. 237, the Democratic judges dissenting.

who is tried by a jury composed wholly of his political opponents, can have a fair and impartial trial within the meaning of the law. * * * I do not insist that in an ordinary criminal trial there is any necessity for watchfulness to keep politics out of the jury box. When, ordinarily, one is

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James B. Howard, a Republican, had also been indicted for the murder of Goebel. He was convicted and obtained a reversal on appeal. (1901) 110 Ky. 356, The three Democratic judges concurred in the result but filed separate opinions. A second conviction followed and a second reversal, the three Democratic judges disssenting. 114 Ky. 372.

On Jan. 5, 1905, the Democrats regained their numerical supremacy in the Court of Appeals. On the first day of the new term the commonwealth filed a petition for a rehearing in the Powers case. This was denied. 71 S. W. 484. The Court of Appeals at the second trial had expressed the opinion that Judge Cantrell should have vacated the bench at defendant's motion. However, he still refused to comply until compelled to do so by rule of court. 74 S. W. 691. These two proceedings under the circumstances amounted to an appeal from a Republican Court of Appeals to a Democratic court. They were both unsuccessful. Powers was again tried, convicted and this time sentenced to be hanged. The Democratic Court of Appeals now reversed the judgment for the third time on technical grounds and one of the new Democratic judges, Henry S. Barker, united with the two Republican judges in a special opinion in which he raised the federal questions discussed in this article. See citations from his opinion in the text. Howard, again convicted and sentenced to life imprisonment, was less fortunate. His sentence was affirmed. 80 S. W. 211. One Republican judge dissented, and one "dissented in part." The Howard case was affirmed on error to the U. S. Supreme Court (1905) 200 U. S. 164.

Powers, now having been in jail since March 17, 1900, and having been tried three times in the State courts and three times found guilty, twice sentenced to life imprisonment and once to be hanged, but each time having been granted a new trial by the State Court of Appeals, was about to be brought to trial for the fourth time in the State court when he filed his petition for removal to the Circuit Court of the United States, and moved for a writ of *habeas corpus cum causa* to take him from the commonwealth's custody. The motion for the writ was sustained in an interesting opinion by Cochran, District Judge, 139 Fed., 452, July 7, 1905. When the United States Marshal attempted to carry out the orders of the court a tug of war which would have been ridiculous if it had not been disgraceful took place between the Democratic mayor of Newport, Ky., assisted by the police, and the Republican jailor, assisted by his deputies. Powers was the football; one party seeking to place him in a cell for which his friends had provided some furnishings, the other to prevent this. The mayor was victorious at first, but the United States Marshal came to the assistance of the jailor and the federal power triumphed. Arrests followed on both sides.

The Commonwealth of Kentucky appealed the *habeas corpus* proceedings to the United States Supreme Court, where the appeal was allowed and a rule granted directing that Powers be restored to the custody of the State. Here the case rests. Powers is in jail awaiting his fourth trial. Those who are interested in an "intensely human" document written with refreshing naïveté and real ability are referred to "My Own Story," by Caleb Powers, The Bobbs-Merrill Company, 1905. See also Samuel Hopkins Adams in *McClure's Magazine*, Vol. 22, 465. For a strictly impartial account see "Kentucky Politics" in Mr. Dooley's Philosophy, p. 121.

arraigned for crime it is immaterial whether the jurors are of the same or an opposing party. Usually this is a question which excites neither the interest of the accused nor that of his counsel. But when the offense springs from an intense political contest all that becomes different. Then the political complexion of the jury is all important. The administration of even-handed justice has no more insidious enemy than political prejudice; it enters unseen and unsuspected into the human mind and undermines the judgment. * * * Neither purity of heart nor exaltation of character offers an antidote for this deadly poison. The pages of history are eloquent with the evils of this passion."[1]

Powers has on each appeal maintained that the Kentucky Court of Appeals has misconstrued the Criminal Code in holding that the court has no authority to reverse for error committed below in selecting jurymen. Does this ruling present a federal question? In other words, will the Supreme Court when questions of due process of law and equal protection are involved always follow the construction of the local law adopted by the State court? It has repeatedly and emphatically been said that it will. But the persistency with which the question is raised by counsel for various plaintiffs in error and the countenance given to the contrary suggestion by certain expressions of the court, together with the importance of the question both practically and as a matter of principle render it perhaps worthy of notice. Of course if the State law as construed or administered by the State courts results in a situation which amounts in itself to a denial of "due process" or "equal protection" the Supreme Court will reverse the decision even though it be of the opinion that the State court erred in construing the local law, and that, if properly construed, it would have violated no federal right. Although it has been asserted that the court has a right to place its own construction on the statute in a case like this[2] the result amounts to an acceptance of the interpretation of the State court and the question is one of academic interest only. But what is the rule in the ordinary case where the statute as construed by the State court does not in itself amount to a flagrant injustice or denial of due process and it is freely admitted that the law

[1] Powers *v.* Commonwealth (Ky. 1904) 83 S. W. 146, 151.

[2] Scott *v.* McNeil (1894) 154 U. S. 34, 45.

might well be as the State court has found it, but it is contended that, in view of the state of the common or statute law of the jurisdiction, such an error has been committed as to amount to a denial of a federal right? Said Mr. J. Randolph Tucker, *arguendo*, in the anarchists' case: "Now if the constitution of Illinois is denied to *these prisoners* when accorded to others, we are denied the equal protection of the laws of Illinois."[1] As the constitutional provision relied on in that case was substantially the same in both the State and federal constitutions, the court was able to pass by this argument by showing that the constitutional provision had not been violated. In Castillo *v.* McConnico,[2] when the plaintiff in error urged a violation of the local law, the court replied by Mr. Justice White:

"The vice which underlies the entire argument of the plaintiff in error arises from a failure to distinguish between the essentials of due process of law under the Fourteenth Amendment, and matters which may or may not be essential under the terms of a state assessing or taxing law. The two are neither correlative or coterminous. * * * When, then, a state court decides that a particular formality was or was not essential under the state statute, such decision presents no federal question, providing always that the statute as thus construed does not violate the Constitution of the United States by depriving of property without due process of law. This paramount requirement being fulfilled, as to other matters the state interpretation of its own law is controlling and decisive."

In a case decided so late as December of last year[3] counsel again raised the point, relying upon Yick Wo *v.* Hopkins[4] and upon the passage from Scott *v.* McNeal,[5] where Mr. Justice Gray said:

"Upon a writ of error to review the judgment of the highest court of a State upon the ground that the judgment was against a right claimed under the constitution of the United States, this court is no more bound by that court's construction of the statute of the Territory, or of the State, when the question is whether the statute pro-

[1] Spies *v.* Illinois (1887) 123 U. S. 131, 153.

[2] (1898) 168 U. S. 674, 683.

[3] Minnesota Iron Company *v.* Kline (1905) 199 U. S. 593.

[4] (1886) 118 U. S. 356.

[5] *Supra.*

vided for the notice required to constitute due process of law, than when the question is whether the statute created a contract which has been impaired by a subsequent law of the State, or whether the original liability created by the statute was such that a judgment upon it has not been given due faith and credit in courts of another State. In every case, this court must decide for itself the true construction of the statute."[1]

Mr. Justice Holmes in the opinion of the court brushed the point aside remarking: "Of course, if the statute as interpreted is not within the prohibitions of the Fourteenth Amendment we do not interfere with the construction adopted by the state court."[2]

This answer meets the situation in Scott *v.* McNeal but needs to be qualified as to Yick Wo *v.* Hopkins. There the ordinance as construed by the California court was admittedly constitutional, but the Supreme Court proceeded first to place its own construction on the ordinance and then to hold that as so construed it violated the Fourteenth Amendment.[3]

Of course it still remains true that the court in Yick Wo *v.* Hopkins held that there was a failure of due process not because the State court had erred in construing the State law but because of the situation resulting from the State law (however construed) as actually administered.

Finally, in Howard *v.* Kentucky[4] the court says:

"He (plaintiff in error) seems to make an issue with the court of appeals of the state upon the law of the state, and

[1] (1894) 154 U. S. 34, 45.

[2] Minnesota Iron Company *v.* Kline (1905) 199 U. S. 593, 597; Strickley *v.* Highland Boy Mining Company (1905) 200 U. S. 527, 530, accord.

[3] And this too where as a question of construction it would seem that the California court may well have been right. The ordinance merely forbade "any person or persons to establish, maintain, or carry on a laundry within the corporate limits of the city and county of San Francisco without having first obtained the consent of the board of supervisors, except the same be located in a building constructed either of brick or stone." The California court held that this merely lodged a discretionary and not an arbitrary power in the supervisors. The Supreme Court using the bad administration of the ordinance as a means of interpretation held that it carried arbitrary powers. This holding does not appear to give proper weight to the ordinary rule that a statute should be construed so as to be constitutional if possible.

To be sure the Supreme Court said that bad administration alone would be enough to violate the Fourteenth Amendment, and the case is always cited as the starting point for the cases on this subject. But it is submitted that it really goes off on the question of construction and that on that point it is one of the hard cases which make bad law. See comments in Williams *v.* Mississippi (1898) 170 U. S. 213, 225.

[4] (1905) 200 U. S. 164, 172, 173.

to contend that the court erred in the interpretation and application of the law. This contention encounters the ruling in In re Converse (137 U. S. 624, 631) and other cases, which hold 'that a state cannot be deemed guilty of violation of its obligations under the constitution of the United States because of a decision, even if erroneous, of its highest court, while acting within its jurisdiction.'[1] We cannot assume error in the decision of the Court of Appeals. We accept it, as we are bound to do, as a correct exposition of the law of the State, common, statutory and constitutional. Our inquiry can only be, did the State law as applied afford plaintiff in error due process as those words are used in the Fourteenth Amendment? We think it did."

The court then goes on to show that as a matter of fact no error as to the law of the State was committed, on the point in question. Then taking up another contention—a contention sure to arise if the Powers case ever comes up on error—the court says:

"The court in its construction of section 281 (the section which forbids reversal for error in constitution of jury) followed the construction established by prior cases, and did not make a discriminating application of that section against the plaintiff in error." He was therefore not deprived of the equal protection of the law.

Here we again see in almost the latest expression of the court upon the subject, coupled with a reiteration of the orthodox statement that error in construing the State law cannot avail the objector, a statement in which there may perhaps lurk the suggestion that an outrageously wrong decision departing from the settled law of the State might be such an unexplained discrimination as would amount to a denial of the equal protection of the laws, even though the new rule were in itself not outrageous.

It is believed that in none of the late cases laying down the ordinary rule has such a situation arisen.[2] In some of

[1] It should be noted that In re Converse which is relied on by the court was a case coming up on *habeas corpus* from the Circuit Court. It would seem that the case might perhaps have been disposed of on the short ground that the writ of *habeas corpus* cannot be used as a writ of error, a proposition which the Supreme Court finds it necessary to reassert in two cases decided March 12th of this year. Felts *v.* Murphy (1906) 201 U. S. 123; Valentina *v.* Mercer (1906) 201 U. S. 131.

[2] It will naturally suggest itself that some of the numerous cases similar to Gelpcke *v.* Dubuque (1863) 1 Wall. 175, 206, where the State court

the cases the Supreme Court has made it plain that it agreed with the rule of construction laid down by the State court; in others the view of the same State court has been permissible[1] or has been sanctioned by time. It is predicted that the Supreme Court has by no means heard the last of Mr. Tucker's contention "if the constitution (of the state) * * * is denied to these prisoners, when accorded to others, we are denied the equal protection of the laws." And while it is of course settled that no ordinary error in a State court can be reviewed, it is submitted that it may still be worth while to contend that due process in this case as in so many others is a matter of degree, and that even where the result reached was in itself not outrageous, there might be such an outrageous holding as to amount to a failure of due process, or such an inexplicable reversal of a long settled rule as to amount to a denial of the "equal protection of the laws." In view of the repeated statements of the court it is perhaps improbable that the contention would be sustained, but it must be remembered that the court has said, in a situation not after all so different as has been sometimes supposed: "We are not unmindful of the importance of uniformity in the decisions of this court, and those of the highest local courts, giving constructions to the laws and constitutions of their own states. It is the settled rule of this court in such cases to follow the decisions of the state courts. But there have

had reversed itself in regard to the validity of a contract under which rights had vested, and which unlike Gelpcke *v.* Dubuque came up on writs of error from the State courts, present exactly the situation here described. McCullough *v.* Virginia (1898) 172 U. S. 102 and cases cited p. 106. But the attention of both counsel and court was almost wholly directed to the contract clause of the Constitution. Many of the cases arose before the possibilities of the Fourteenth Amendment were fully realized, if indeed they are yet. Where the Fourteenth Amendment was noticed it was apparently not seriously relied on and the point was treated summarily by the court, *e. g.* Central Land Company *v.* Laidley (1895) 159 U. S. 103. In none of the cases so far was noticed the precise contention suggested, *i. e.* that while an ordinary error of a State court is not reviewable a ruling might be so outrageous as to account for a failure of due process brought home to the court.

[1]Arrowsmith *v.* Harmoning (1886) 118 U. S. 194; Gibson *v.* Mississippi (1896) 162 U. S. 565, 591.

[2]For a most interesting discussion of Gelpcke *v.* Dubuque and the similar line of cases arising on writs of error see a monograph which received the Sharswood Prize for 1899 at the University of Pennsylvania, by Mr. Thomas Raeburn White, of the Philadelphia Bar, now Assistant City Solicitor of Philadelphia.

been heretofore, in the judicial history of this court, as doubtless there will be hereafter, many exceptional cases. We shall never immolate truth, justice and the law, because a state tribunal has erected the altar and decreed the sacrifice."[1]

There is another question, analogous to the one last discussed, which might well arise on a new trial of the Powers case. Suppose, at the forthcoming trial, the court changes its ruling and instructs the officers who summon the jury to make no discrimination between Republicans and Democrats. Then suppose Powers claims that these instructions have been disobeyed, but the court decides against him and rules that the officers have done their duty. Is this ruling of the court upon an interlocutory question of fact reviewable in the Supreme Court under the Fourteenth Amendment? If rulings of the trial court on interlocutory questions of fact are in all cases open to review in the Supreme Court, it certainly throws open a wide field of investigation which might lead to serious encroachment on the State courts if improperly administered. On the other hand, if such questions are never open, the State court can in a case like this deny the federal right and defy the national authority with impunity. The authorities are not in a very satisfactory condition. There are general statements such as that found in a late case in regard to a State tax law, where the court said:

"Counsel for plaintiff in error says in his brief that he does not contend 'that the act itself is not sufficient to give due process,' but he insists 'that the manner of observance of that act is want of due process'; in other words, that the statutes had not been complied with. But the state supreme court held that the county officers and defendants in error had fully complied with the laws. So that * * * (plaintiff in error) only objects to the determinations of local law or of fact, not in themselves reviewable here."[2]

[1] Gelpcke *v.* Dubuque (1863) 1 Wall. 175, 206.

[2] French *v.* Taylor (1905) 199 U. S. 274, 277, citing Leigh *v.* Green (1904) 193 U. S. 79. Compare the holding in Chicago, Burlington & Quincy Railroad *v.* Chicago (1897) 166 U. S. 226, on the question of compensation for property taken by eminent domain. The court held that it could not examine the finding of a jury even in a State court except as at common law and said: "Even if we were of opinion, in view of the evidence, that the jury erred in finding that no property right, of substantial value in money, had been taken from the railroad company, by reason of the open-

But these are general statements in cases where it does not appear that there was any basis for claiming outrageous errors in the decisions of questions of fact. In the anarchists' case, as has been pointed out in an acute article,[1] the court gave countenance to the opposite view. The plaintiffs in error claimed that they were being deprived of life and liberty and denied the equal protection of the laws through the maladministration of the jury law of Illinois, that is, by incorrect decisions as to the competency of jurymen. And the court, instead of saying shortly that even if this were true it was beyond the limits of federal jurisdiction,[2] entered into an elaborate examination of the record to show that the plaintiffs in error were mistaken in their criticisms of the rulings of the court. Said the Court :[3]

"We proceed, then, to a consideration of the grounds of challenge, to the jurors Denker and Sanford, to see if in the actual administration of the rule of the statute by the court the rights of the defendants under the Constitution of the United States were in any way impaired or violated." The court then reviewed the examination of these two jurors on the *voir dire*, and, having pointed out that even on appeal from a court of the same general jurisdiction, only a clear case of abuse of discretion would be ground for reversal, observed that this rule "ought not to be relaxed in a case where, as in this, the ground relied on for the reversal by this court of a judgment of the highest court of the State is, that the error complained of is so gross as to amount in law to a denial by the State of a trial by an impartial jury to one who is accused of crime. We are unhesitatingly of the opinion that no such case is disclosed by this record."

Of course, it is easy to minimize the importance of this case by saying that it was an exceptional case, where the

ing of a street across its right of way, we cannot on that ground re-examine the final judgment of the State court. We are permitted only to enquire whether the trial court prescribed any rule of law for the guidance of the jury that was in *absolute disregard* of the company's rights to just compensation." The court explained the words "absolute disregard" by saying that merely minor errors of law would not amount to a failure of due process. Would the Supreme Court review an outrageous ruling of a State court in setting aside a verdict or refusing to do so?

[1] I Harvard Law Review 307.

[2] Which, of course, the court, being a court of limited jurisdiction, should have done if it had not jurisdiction.

[3] Spies *v.* Illinois (1887) 123 U. S. 131, 170, 180.

whole country wished it made plain that the defendants were receiving fair play, and that therefore an *ultra vires* examination into the facts, not leading to affirmative action, is no authority for the future. But it is only in an exceptional case that it can possibly be contended that the federal jurisdiction exists, *i. e.*, cases where there is reason to fear that the peculiar circumstances have led to outrageous rulings in the State courts, and this will usually be in cases exciting great interest, such as the one in question. It is submitted once more that due process of law is a question of degree, and that, if the ruling of the State court be outrageous, the federal courts have jurisdiction to review it under the Fourteenth Amendment even as to interlocutory questions of fact.

WILLIAM CULLEN DENNIS.

NEW YORK CITY.